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In The
Supreme Court of the United States

JAMES OBERGEFELL, et al.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF THE AMICI[1]

The CatholicVote.org Education Fund is a nonpartisan voter education program devoted to building a culture that respects the sanctity of life, religious liberty, marriage, and the family. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good in light of the Roman Catholic religious tradition. Moreover, members of CatholicVote.org maintain that the commitment to democratic self-government at the center of our constitutional system requires deference to the will of the people where, as here, their judgment comports with the natural law.

Members of CatholicVote.org believe there is no institution more important to the continued vitality of our illustrious nation than the institution of the family properly understood in light of the natural law tradition as the union of one man and one woman in marriage. CatholicVote.org Education Fund files this brief to support the understanding of marriage, and therefore family, deeply rooted in the history and traditions of the American People.

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[1] All parties consented to the filing of this brief. Neither party nor its counsel authored this brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. Only amici curiae, their members, and their counsel made a monetary contribution.

SUMMARY OF THE ARGUMENT

In this case, the Sixth Circuit addressed claims that Marriage Amendments ratified by the people of the states of Michigan, Kentucky, Tennessee, and Ohio, violated the Fourteenth Amendment to the Constitution of the United States. There are two questions presented. First: does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? Second: does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

The answer to both questions is: No. The reasons are simple. The history and traditions of our nation show that marriage has always been understood as the union of one man and one woman. Consequently, Petitioners cannot show that the Marriage Amendments deprive them of a fundamental liberty interest protected by Due Process, and by the same token, the Marriage Amendments easily satisfy Equal Protection. Furthermore, using the Fourteenth Amendment to federalize the definition of marriage, and therefore family, would wreak havoc upon centuries of precedent addressing the allocation of authority in the federal system.

This Court should affirm the decision below and repudiate the Petitioners' audacious effort to both constitutionalize and revolutionize the definition of marriage, and therefore family, throughout the

United States. In so doing, this Court will demonstrate its commitment to constitutional principles of the first rank, i.e., the federal system and the sovereignty of the people. Put another way, by respecting the federal system, and the right of the people in the states to promote and protect the institution of marriage, this Court will demonstrate its fidelity to government of the people, by the people, and for the people.

ARGUMENT

Petitioners' Fourteenth Amendment arguments fail at the start. The Petitioners must establish that that the right of persons in a same-sex relationship to marry is deeply rooted in the history and traditions of the American People in order to succeed on their Due Process claim. The Petitioners simply cannot do so. Consequently, Petitioners must show that laws embodying the traditional understanding of marriage have no conceivable connection to legitimate state interests. Petitioners cannot even come close. Finally, the Petitioners' arguments must be rejected for the additional reason that federalizing the definition of marriage would destroy the coherence and integrity of over a century of precedent designed to preserve our federal system.

I. There Is No Basis For This Court To Declare A Constitutional Right To Same-Sex Marriage Under The Fourteenth Amendment.

This Court has proceeded with humility and circumspection when addressing claims for fundamental liberties premised on appeals to Substantive Due Process. It has emphasized that the "Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). It has "required in substantive due process cases a careful description of the asserted fundamental liberty interest." *Id.* at 721. And it has emphasized that "[o]ur Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision-making." *Id.* The virtue of this Court's restrained approach is to "rein in the subjective elements that are necessarily present in due process review . . . by establishing a threshold requirement that a challenged state action implicate a fundamental right before requiring more than a reasonable relation to a legitimate state interest to justify the action. . . ." *Id.* at 722.

This Court has proceeded with similar caution when evaluating claims advanced under the Equal Protection Clause. It has observed that the provision "creates no substantive rights," but "[i]nstead . . .

embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 794, 799 (1997). The legislative classification need only be "based on rational speculation unsupported by evidence or empirical data," *Heller v. Doe*, 509 U.S. 312, 320 (1993), because the "problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Id.* This Court has adamantly insisted that it is "not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

These principles flow from this Court's recognition that neither the Due Process Clause nor the Equal Protection Clause license this Court to engage in national policy-making as a matter of federal constitutional law. The Court has required those who claim rights under either clause to meet a heavy burden when they seek to enlist this Court's considerable power to coerce state action as a matter of constitutional mandate. In this way, this Court has shown a fitting respect for its specific and limited role in our system of government, one in which the sovereign power of the people is divided between the branches of the federal government as well as between the federal government and the states.

The Petitioners' effort to enlist this Court in their campaign to constitutionalize and revolutionize the definition of marriage, and therefore family, fails at

the start when seen in light of this Court's precedent. First, the history and traditions of the American People unequivocally show that marriage has always been understood as the union of one man and one woman. Second, reasoned reflection on the nature of marriage supports the view that marriage is properly limited to the union of one man and one woman. Third, the lessons of experience – to the extent they can be reliably gleaned from the social sciences – confirm the judgment that the traditional understanding of marriage and family does promote the good of the spouses, children, and society.

A. History and Tradition.

The Anglo-American legal tradition has consistently defined marriage as the union of one man and one woman. For example, in the Thirteenth Century, Henri de Bracton, described the "union of man and woman, entered into by the mutual consent of both, which is called marriage" as an institution inextricably linked to "the procreation and rearing of children," and rooted ultimately in the *jus gentium*, or "law of nations," seen throughout the world precisely because it was common to mankind. H. Bracton, 1 *On the Laws and Customs of England* 27 (S. Thorne ed. 1968). In the Eighteenth Century, Blackstone described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that is regulated." William Blackstone, 1 *Commentaries*

410 (S. Tucker ed., 1803). In the early Nineteenth Century, St. George Tucker, who compiled and annotated the common law tradition in the State of Virginia while teaching law at William and Mary, accepted without qualification Blackstone's summation of the law on the matter of marriage. *Id.* In the Twentieth Century this Court acknowledged that the right of a man and woman "to marry, establish a home and bring up children," was among those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 43 U.S. 625 (1923).

This Court has rarely had occasion to opine on the nature of marriage for the obvious reason that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States." *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890). Nevertheless, in those rare cases where the matter has come before it this Court has always affirmed the traditional understanding of marriage as the unique relation of man and woman conducive to the good of spouses, children, and society.

Thus in the rarified context of federal administration of the territories, this court affirmed legislative authority to protect the institution of marriage by prohibiting plural marriages. *Reynolds v. U.S.*, 98 U.S. 145, 165-66 (1878). In that case this Court thought the federal measure was plainly proper given the evident importance of marriage as an institution upon which "society may be said to be built, and out

of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds*, 98 U.S. 145, 165-66.

Shortly thereafter this Court again upheld legislative power to recognize the traditional definition of marriage as a means of preparing federal territories for admission as a state. *Murphy v. Ramsey*, 114 U.S. 15 (1885). Upholding federal legislation limiting marriage to the union of one man and one woman this Court reasoned that "certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Id.* at 54.

Three years later in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court acknowledged that "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Id.* at 205-06. And it described marriage as an "institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the

family and of society, without which there would be neither civilization nor progress." *Id.* at 211.

As noted earlier, *Meyer*, *supra*, struck down a state law seeking to dictate how parents might shape the education of their children the right of a man and woman "to marry, establish a home and bring up children," was among those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 43 U.S. 625 (1923). And in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court recognized a fundamental interest in natural procreation on the ground that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

In *Loving v. Virginia*, 388 U.S. 1 (1967), this Court struck down a state law that created a race-based limitation on the ability of a man and woman to marry, because "distinctions between citizens solely because of their ancestry . . . [were] odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 11. For this same reason, this Court concluded that "[t]o deny this fundamental freedom on so unsupportable a basis as racial classifications . . . is so directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . . as to deprive citizens of liberty without due process of law." *Id.*

Examples could be multiplied but it is needless to do so. There is no question that from the very beginning of our nation the American People – and this

Supreme Court of the United States – have understood marriage to be the union of one man and one woman, have regarded that union as the proper basis for the family, and have protected that union for the good of society. It is terribly obvious that there is no such tradition of same-sex marriage; quite the contrary, from the colonial period until 2003 no state recognized anything remotely like same-sex marriage. See Peter Lubin & Dwight Duncan, "*Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*," 47 Cath. U. L. Rev. 1271, 1276 (1998). The Petitioners seek to have this Court manufacture such a right based on their individual desires. This Court should have no part in that enterprise.

B. Jurisprudence.

In the Declaration of Independence the Founders of our nation made explicit their reliance on the "laws of nature and nature's God." See Declaration of Independence, 1 U.S.C. xli (2015). Scholars who continue to think and write in the natural law tradition insist that the union of one man and one woman provides the only basis for marriage – by definition.

For example, John Finnis, renowned scholar and professor of law at both Oxford University and Notre Dame Law School, has sketched the basic philosophical foundation for the American tradition of marriage as follows:

> Marriage is a distinct fundamental human good because it enables the parties to it, the

> wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely, the bringing of that person into existence as conceptus, embryo, child, and eventually adult fully able to participate in human flourishing on his or her own responsibility. The understanding that this two-sided good is a profoundly desirable and profoundly demanding opportunity entails that marriage is utterly misunderstood when conceived as no more than an official status, imposed by law and accompanied by government entitlements and mandates. Its intelligible and inherent connection with human flourishing (and thus with human nature) makes it far more than a function of legal arrangements and definitions. The intelligibility and worth of its contours are a basis for rejecting some legal arrangements and definitions and mandating others.

See John M. Finnis, "*Marriage: A Basic and Exigent Good*," Notre Dame Law School Legal Studies Research Paper No. 09-13. Available at http://ssrncom/abstract=1392288.

Critically, this view of marriage does not reduce marriage to a mere instrumental means to the end of procreation – although it undoubtedly does provide the proper context for procreation and child-rearing – as Robert P. George, of Princeton University, and Gerard V. Bradley of Notre Dame Law School have

pointed out. *See, e.g.*, Robert P. George and Gerard V. Bradley, "*Marriage and the Liberal Imagination*," 84 Geo. L.J. 301 (1995) (and sources cited therein).

Significantly, the philosophical rationale for this view has been consistently held for centuries. For example three of the greatest Greek philosophers, Socrates, Plato, and Aristotle, all believed that the union of man and woman was the only proper context for sexual activity. See John M. Finnis, "*Law, Morality, and 'Sexual Orientation'*," 9 Notre Dame J.L. Ethics & Publ. Pol'y 11, 17-18 (1995). Indeed, this understanding of marriage has been held world-wide throughout all of human history with aberrant views emerging only at the very end of the twentieth century. See Lynn D. Wardle and Lincoln C. Oliphant, "*In Praise of Loving: Reflections on the 'Loving Analogy' for Same-Sex Marriage*," 51 How. L.J. 117, 121 (2007) (noting that "[u]ntil the end of the twentieth century, it could be accurately said that no nation in the history of the world had ever legalized same-sex marriage."). In sum, scholars of the natural law tradition upon which the Declaration of Independence rests provide the philosophical rationale for the constant practice of the American People. In this way, these scholars show that the understanding of marriage reflected in the laws of the several states throughout the history of our nation is fully consistent with, and supported by, reasoned reflection on human nature.

It is doubtless true that neither the legislators who embodied the traditional understanding of

marriage in their law, nor the judges who administered the law of marriage, were trained philosophers. It is likewise certain the people of the states that ratified marriage amendments were not philosophers either. See Lynn D. Wardle and Lincoln C. Oliphant, "*In Praise of Loving*," 51 How. L.J. at 162; see also Marriage Law Foundation (showing forty-four states with laws limiting marriage to a man and a woman). But what does this prove?

We submit that the broad consensus throughout the United States simply goes to show that the understanding of marriage as the union of one man and one woman can be safely counted among the self-evident truths upon which our forefathers so confidently placed the foundation of our nation. Certainly, the history and traditions of our nation establish that from the beginning of our nation marriage has always been understood to be the union of one man and one woman as well as the proper basis for the family. This Court should affirm the right of the people in the states to confirm the centuries-old understanding of marriage.

C. The Lessons of Experience.

The time-honored understanding of marriage reflected in the laws of the American nation as well as reasoned reflection on human nature is also corroborated by the human experience – to the extent its lessons can be reliably gleaned from the social sciences. The literature regarding marriage and family is

voluminous and variable but two things seem certain. First, families centered on the marriage of a man and woman who rear their children provide concrete benefits to both spouses and children. Second, there is no reliable evidence suggesting that family-units centered on same-sex relationships provide comparable results.

The evidence demonstrating the many ways in which the traditional understanding of marriage and family promote the good of the spouses, children, and the common good of society is as manifest as the good fruits of traditional marriage and family are manifold. One scholar who assessed the impact of social trends relating to the breakdown of the traditional family at the end of the Twentieth Century found the following, among other things. The median family income for two-parent traditional families is more than double that of families in which the mother is divorced and more than four times as much as that of families in which the mother never married. William J. Bennett, *The Index of Leading Cultural Indicators, American Society at the End of the Twentieth Century*, 60 (Waterbrook 1999). Seventy-two percent of America's adolescent murderers, 70 percent of long-term prison inmates, and 60 percent of rapists come from fatherless homes. *Id.* at p. 61. Children who grow up with only one of their biological parents, when compared to children who grow up with both biological parents, are more likely to have a child out of wedlock, 2.5 times more likely to become teenage mothers, twice as likely to drop out of high-school, and 1.4

percent times more likely to be out of school and not working. *Id.* at 61-62.

Another scholar looking at the role of the family in the period between 1960 and 2010 found consistent results. See Charles Murray, *Coming Apart, The State of White America, 1960-2010* (Crown Forum 2012), pp. 153-171. He summarizes the evidence as follows:

> No matter what the outcome being examined – the quality of the mother-infant relationship, externalizing behavior in childhood (aggression, delinquency, and hyperactivity), delinquency in adolescence, criminality in adults, illness and injury in childhood, early mortality, sexual decision-making in adolescence, school problems and dropping out, emotional health, or any other measure of how well or poorly children do in life – the family structure that produces the best outcomes for children on average, are two biological parents who remain married." *Id.* at 162.

And this is not a partisan claim. "No other set of important findings . . . are as broadly accepted by social scientists who follow the technical literature, liberal as well as conservative. . . ." *Id.* at 162. Of course, a family-unit centered on a same-sex relationship is, quite obviously, not the traditional family.

In this regard, the evidence available concerning families centered on same-sex unions is sparse and conclusions tentative at best. But the most reliable evidence suggests that there are significant differences between outcomes for children reared in

households centered on same-sex relationships and those outcomes are inferior when compared to those engendered by the traditional family. See Ana Samuel, ed., *No Differences? How Children in Same Sex Households Fare* (Witherspoon Institute 2014) (a useful compendium of recent social science literature on the topic).

For example, studies by Dr. Mark Regnerus support the conclusion that children raised in households centered on same-sex relationships exhibit inferior outcomes in terms of objective measures of wellbeing – outcomes much closer to those experienced by children reared outside the traditional family. See Mark Regnerus, "*How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study*," 41 Soc. Sci. Res. 752 (2012); see also Mark Regnerus, "*Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*," 41 Soc. Sci. Res. 1367 (2012). Significantly, independent peer review indicates that Dr. Regnerus' **methodology is sound**. See Dr. Walter R. Schumm, "*Methodological Decisions and the Evaluation of Possible Effects of Different Family Structures on Children: The New Family Structures Survey (NFSS)*," 41 Soc. Sci. Res., 1357-1366 (2011).

In contrast, **severe methodological flaws** have consistently been found in studies purporting to show that children reared in households with same-sex

relationships do not experience different outcomes. For example, Dr. Robert Lerner and Dr. Althea Nagai scrutinized the methodological integrity of forty-nine studies purporting to establish no difference in outcomes for children. They found at least one fatal research flaw in each of the forty-nine studies with the result that the studies provided no basis for the claim. See R. Lerner & A. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (Marriage Law Project, 2001).

To the same effect is a more recent study by Dr. Loren Marks, which scrutinized studies relied upon by the American Psychological Association as the grounds for its assertion that there is no significant difference in outcomes for children reared in households centered on same-sex unions when compared to traditional unions. Marks found **serious methodological flaws** in the studies claiming to find no differences in outcomes for children. *See, e.g.*, Loren Marks, "*Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*," 41 Soc. Sci. Res. 735, 748 (2012) (finding serious flaws in research cited in the APA publication on same-sex parenting).

The amicus do not wish to be misunderstood. We do not mean to suggest that it is the proper role of this Court to sift through the vast literature addressing marriage and family in order come up with a new definition of marriage, and therefore family, as a matter of constitutional law. That is a question

reserved to the people of the states acting through their legislative branch.

The point here is simply that the evidence supports the commonsense judgment that the traditional understanding of marriage and family is wholly reasonable. Indeed, the findings cited earlier suggest that the state has much more than a legitimate interest in promoting the traditional understanding of marriage and family; it has a compelling interest.

But again these are matters for legislative judgment – not a judicial decision constitutionalizing the definition of marriage and therefore family. In this regard, the amici are confident that this Court will appreciate the grave risk that would follow from casting an erroneous judgment on the nature of marriage, and therefore family, in constitutional law. Truth be told, it will be children who have no meaningful choice as to their fate who will suffer from an error – not the adults who claim the right to marriage. Surely the mere risk of inflicting such grievous harm upon the innocent provides a compelling reason for this Court to abjure the power to define the institution of marriage, and therefore family, for the fifty states of the United States.

For these reasons it is apparent that the Petitioners' Due Process and Equal Protection arguments are wholly untenable. There is nothing in the history and traditions of our nation supporting a claim to a fundamental liberty interest in same-sex marriage. Centuries of reasoned reflection on the nature of

marriage support the view that the institution is inherently limited to the union of a man and a woman so as to serve the good of both spouses, children, and society. The most reliable evidence that can be gained from the social sciences unquestionably supports the view that the traditional understanding of marriage, and therefore family, does in fact promote the flourishing of spouses, children, and society. And there is no reliable basis for a claim that family units centered on same-sex relationships produce similar outcomes for children, and therefore, society.

This case then is a perfect complement to *Loving*, *supra*, but requires the opposite result. Here there is no fundamental right to same-sex marriage and therefore the classification limiting marriage to a man and a woman needs only a rational basis. There is no question that the state advances multiple legitimate interests when it seeks to protect and promote the traditional understanding of marriage and family.

II. Federalizing The Definition Of Marriage Would Contradict A Century Of Precedent Devoted To Preserving Limited Government.

Petitioners' effort to federalize the definition of marriage, and therefore family, also asks this Court to reject over a century of carefully crafted jurisprudence addressing the constitutional allocation of power between the federal and state governments. Although it is difficult to estimate the destructive

impact a decision to federalize the definition of marriage would have on this Court's precedent, the following are some of the most certain and egregious consequences. First, federalizing the definition of marriage would require this Court to disregard its stated solicitude for the vehicles of direct democracy, and ultimately, the sovereignty of the people as distributed in the federal system. Second, federalizing the definition of marriage would require this Court to disregard large swaths of precedent preserving the legitimate prerogatives of state sovereignty under the Tenth and Eleventh Amendments. Third, federalizing the definition of marriage would require this Court to repudiate its carefully crafted Fourteenth Amendment jurisprudence. In short, the Petitioners ask this Court to pursue a course of action utterly inconsistent with the constitutional allocation of sovereignty in our federal system. This Court should reject their request summarily.

A. Democratic Self-Government In The Federal System.

Federalizing the definition of marriage would require this Court to show a callous disregard for democratic self-government utterly inconsistent with its precedent. In this case the Petitioners challenge a definition of marriage that was engrafted onto the constitutions of Michigan, Ohio, Kentucky, and Tennessee. *DeBoer v. Snyder*, 772 F.3d 388, 396-99 (6th Cir. 2014). In so doing, the people of the states made recourse to the fundamental axiom of our political

system, i.e., in a republican form of government the "Supreme Power resides in the body of the people." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793).

The significance of the action taken by the people of these several states when they chose to employ direct democracy in order to constitutionalize their understanding of marriage cannot be overstated. But it can be simply put: by incorporating their understanding of marriage into their constitutions – the fundamental law of their political societies – the people of these states demonstrated their conviction that the institution of marriage is a fundamental institution of their body politic. The Petitioners ask this Court to strike down Marriage Amendments which arise directly from, and were approved directly by, the people of four sovereign states.

Granting the Petitioners' request is unthinkable given the respect for the sovereignty of the people reflected in precedent protecting the political process. For example, in *Meyer v. Grant*, 486 U.S. 414 (1988), this Court observed that the initiative process was "at the heart of political expression such that restraints upon the process subject to the most exacting scrutiny. . . ." *Meyer*, 486 U.S. at 420; *see also Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999) (recognizing that voter initiatives involve "core political speech . . . for which First Amendment protection is at its zenith."). In *Bellotti* this Court struck down efforts to limit campaign speech by corporate persons because "the people in our democracy are entrusted with the responsibility

for judging and evaluating the relative merits of conflicting arguments." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). More recently, in *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010), this Court built on *Belloti*, emphasizing that the "First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Id.* at 340.

This Court has justified its zealous protection of the democratic process on the grounds that history shows that the mechanisms of direct democracy "demonstrate devotion to democracy, not to bias, discrimination, or prejudice," *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). In fact, recourse to petitioning and popular vote, "tap the energy and the legitimizing power of the democratic process," *Doe v. Reed*, 561 U.S. 186, 195 (2010), and as a result, "[i]n the federal system States respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times." *Bond v. U.S.*, ___ U.S. ___, 131 S.Ct. 2355, 2364 (2011).

The Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action*, ___ U.S. ___, 134 S.Ct. 1623 (2014), is in keeping with the high value this Court has always attached to democratic decision-making. In that case, this Court confronted an exercise of direct democracy that barred the use of racial preferences and therefore touched on one of the most sensitive issues in the history of our nation – invidious racial discrimination. *Schuette*, 134 S.Ct. at 1629 (Kennedy J.). Nevertheless, this Court found "no

authority in the Constitution of the United States or this Court's precedents for the Judiciary to set aside Michigan laws," *Schuette*, 134 S.Ct. at 1638, and therefore refused to abrogate the constitutional amendment. The Court's rationale was straightforward and compelling: "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.*; see also, *Schuette*, 134 S.Ct. at 139 (Roberts, CJ, concurring, noting that "[p]eople can disagree in good faith on this issue, but it . . . does more harm than good to question the openness and candor of those on either side of the debate.").

The Petitioners' requests would have this Court make a mockery of its stated commitment to democracy. For the ringing endorsements of democratic self-government just cited will ring hollow indeed if this Court strikes down its results based on the farfetched claims advanced in this case. The Petitioners' tendentious arguments manifest utter contempt for the results of the democratic process, and ultimately, the sovereignty of people. This Court should dismiss them peremptorily.

B. Federalism.

Petitioners' contempt for the sovereignty of the people expressed via the democratic process yields a parallel contempt for the sovereignty of the states. The disregard for state sovereignty is unavoidable given that this case concerns marriage, and ultimately family, for as this Court made plain over a century

ago, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States." *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890).

But the larger point, which highlights the destructive impact that a decision to federalize the definition of marriage would have on this Court's precedent, is that the decision in *Ex Parte Burrus*, is just one manifestation of the federal structure that provides the bedrock for our system of limited government. In the federal structure created by our Constitution the states retain "a residuary and inviolable sovereignty," with the consequence that both Congress and this Court must "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 715, 748 (1999).

Given that "Supreme Power resides in the body of the people," *Chisholm*, 2 U.S. (2 Dall.) at 457, it follows that the state sovereignty protected by the constitutional allocation of power is inextricably interwoven with popular sovereignty. And from this it follows that the constitutional allocation of power is a means to the ultimate end of constitutional government, nothing less than government of, by, and for the people.

Accordingly, this Court has insisted that when the states operate in their traditional areas of competence our Constitution is understood to "allow the

States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2005). And the deference accorded state action in their traditional areas of activity, in turn, reflects the insight that the "federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Bond*, 131 S.Ct. at 2364. This Court would have to eviscerate centuries of painstakingly crafted jurisprudence elaborating the federal structure under the Tenth, Eleventh, and Fourteenth Amendments in order to federalize marriage.

1. Precedent under the Tenth and Eleventh Amendments.

Federalizing the definition of marriage would wholly undermine this Court's precedent under the Tenth and Eleventh Amendments. This Court has long recognized that the reservation of power in the Tenth Amendment is one textual indicia of the federal structure which serves to limit federal power in certain contexts. This reading of the text is true to its history. Joseph Story, one of the earliest and greatest expositors of the federal constitution, described the Tenth Amendment as an "affirmation of what, upon any just reasoning, is a necessary rule of interpreting

the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833). And even as our nation confronted the single greatest challenge to the federal system, the Civil War and Reconstruction, this Court took pains to emphasize that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869).

This Court has always evaluated the proper scope of federal authority vis a vis the several states in the context provided by the federal structure. In *New York v. U.S.*, 505 U.S. 144 (1992), for example, this Court repudiated a federal law seeking to dictate the way in which that state exercised its sovereign power as inconsistent with the federal system. *New York*, 505 U.S. at 174-75. Significantly, the Court rejected a claim that the importance of federal interests might justify the measure recognizing that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *Id.* at 178. Likewise, in *Printz v. U.S.*, 521 U.S. 898 (1997), this Court pointed to the Tenth Amendment when

rejecting federal efforts to dictate the actions of state officials. There the Court noted that federal actions contrary to state sovereignty were "merely an act of usurpation . . . which deserves to be treated as such." *Printz*, 521 U.S. at 924. These decisions acknowledging that the Tenth Amendment serves as an implicit check on certain claims for federal power are buttressed by this Court's precedent under the Eleventh Amendment.

Therefore it is unsurprising that federalizing the definition of marriage would also be utterly inconsistent with this Court's Eleventh Amendment jurisprudence. This Court has noted that the Eleventh Amendment must be understood in light of the "presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact. . . ." *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991). Put another way, this Court has recognized that the Eleventh Amendment, like the Tenth Amendment, serves as a textual indicia of the state sovereignty that the federal constitution presupposes and preserves in large measure.

It is both telling and laudable that decisions in this area feature a steadfast rejection of encroachments on state sovereignty even when those violations aggrandize this Court's power. For example, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court rejected federal efforts to give it jurisdiction over the State of Florida, observing that the Eleventh Amendment stands for the proposition

that "each State is a sovereign entity in our federal system; and . . . it is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent." *Seminole Tribe*, 517 U.S. at 54. This Court went further in *Alden v. Maine*, 527 U.S. 706, 748 (1999), rejecting efforts to open state courts to federal claims, because the "federal system established by our Constitution preserves the sovereign status of the States," by "reserv[ing] to them a substantial portion of the Nation's primary sovereignty. . . ." *Id.* at 714.

Pages of precedents could be mustered along these lines but the point is apparent and incontrovertible. This Court's decisions under the Tenth and Eleventh Amendments embody an abiding respect for the role that the federal structure plays in promoting democratic self-government. In both lines of precedent this Court has refused to countenance efforts to coerce the sovereign states. Federalizing the definition of marriage so as to abrogate state law defining the institution of marriage, and therefore family, would be patently at odds with the decisions of this Court under the Tenth and Eleventh Amendments.

2. Precedent under the Fourteenth Amendment.

Federalizing the definition of marriage would also destroy the coherence and integrity of this Court's carefully crafted Fourteenth Amendment jurisprudence. Even in this area, where claims for

federal power vis a vis the states are at their apogee, this Court has labored long and hard to "strike[ ] the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S. at 757.

In *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), for example, this Court began its review of the Religious Freedom Restoration Act (RFRA), by emphasizing that the "Federal Government is one of enumerated powers," *id.* at 516, and cautioning that a federal "power to legislate generally upon life, liberty, and property . . . was repugnant to the Constitution." *Id.* at 525. Noting the dramatic impact the federal law would have on the States, "in terms of curtailing their traditional general regulatory power," *id.* at 534, it struck down RFRA as an intrusion on state sovereignty inconsistent with this Court's precedent.

Here too this Court has eschewed illicit aggrandizements of its power at the expense of state sovereignty. Thus in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), this Court rejected an abrogation of state sovereign immunity for claims advanced under the Age Discrimination in Employment Act (ADEA), emphasizing that "[o]ur Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so," *id.* at 86, and concluding that "[j]udged against the backdrop of our equal protection jurisprudence, it is clear that ADEA is so out of proportion to the supposed remedial or preventive object that it cannot be understood as . . . designed to prevent unconstitutional behavior." To

the same effect is this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in which this Court rejected an abrogation of state sovereign immunity under the Americans with Disabilities Act because the state was only subject to rational basis and the legislative record "simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination . . . against the disabled." *Id.* at 368.

There are cases in which this Court has allowed federal impositions upon state sovereignty under the Fourteenth Amendment, but they concern very different considerations and provide no meaningful guidance for the cases at bar. For obvious reasons this Court has rightly upheld federal legislation striking at racial classifications, "a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice." *Schuette*, 134 S.Ct. at 1637; see also, *State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding federal law restriction on state laws regulating voting under the Fifteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding federal law regulating state voting under the Fourteenth Amendment). Likewise it has upheld exercises of federal authority designed to eradicate sex-discrimination well established by the record. See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003) (noting "[t]he history of many state laws limiting women's employment opportunities is chronicled in – and, until relatively recently, was sanctioned by – this Court's own opinions.").

But even in these areas this Court has vigilantly preserved the federal balance by resisting abusive claims made for federal power. Thus in *Shelby County v. Holder*, ___ U.S. ___, 133 S.Ct. 2612 (2013), this Court rejected the continued regulation of states because there was no showing of a proper justification for continued federal regulation of state practices – even though such federal policing had once been unquestionably proper. *Id.* at 2622. Likewise, in *Coleman v. Court of Appeals of Maryland*, ___ U.S. ___, 132 S.Ct. 1327 (2012), this Court rejected federal abrogation of state sovereign immunity because there was no showing sufficient to justify the regulation of state sovereignty. *Id.* at 1338 (noting that in order to abrogate state sovereign immunity, "Congress must identify a pattern of constitutional violations . . . [i]t failed to do so. . . .").

Finally, this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), cannot possibly support the Petitioners' effort to federalize – and revolutionize – the definition of marriage and family. In *Romer*, this Court did strike down a state law employing a classification based on sexual orientation. But it did so because the law "impos[ed] a broad and undifferentiated disability on a single group," *id.* at 632, which was "identifie[d] . . . by a single trait and then denie[d] . . . protection across the board." *Id.* at 633. Confronted with a law of that kind, this Court found that it "raised the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

No credible claim can be made that *Romer's* rationale applies here. The present case concerns state law addressing the ability to marry alone – not the broad and undifferentiated equal protection of the law at issue in *Romer*. The law governing marriage limits the institution to the union of a man and a woman, applies equally to both, and applies without regard to sexual orientation (or practice for that matter).

It cannot be gainsaid that the American people are engaged in a great national debate about the very nature of the institution of marriage. See *Hollingsworth v. Perry*, ___ U.S. ___, 133 S.Ct. 2652, 2659 (2013) (noting that the "public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry."). But it will be a sorry day indeed when this Court is prepared to hold that laws embodying the traditional understanding of marriage reduce to nothing but "[m]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable," *Garrett*, 531 U.S. at 367, or reflect nothing more than "animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. Yet that is exactly what the Petitioners' request boils down to in the end. We trust that the American people will not live to see such a day of infamy.

3. Precedent under the Fifth Amendment.

Precisely because the Petitioners' argument shows contempt for the legitimate claims of state

sovereignty it also happens that federalizing the definition of marriage would contradict this Court's recent decision in *United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (2013). In that case this Court confronted a federal statute, the Defense of Marriage Act (DOMA), which refused to treat as married persons whose marriage was deemed lawful under the law of their home state. This Court began by emphasizing that state laws "defining and regulating marriage . . . must respect the constitutional rights of persons . . . but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 2691. As this Court put it, the "significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Id.* This Court held that DOMA violated Due Process on the grounds that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage," *id.* at 2692, and "impose[d] a disability on a class by refusing to acknowledge a status the State finds to be dignified and proper." *Id.* at 2695-96. In this way, *Windsor*, jibes with the mainstream of precedent addressing the allocation of sovereignty in our federal system, and more specifically, the status of marriage as the proper subject of state regulation.

The considerations just listed establish that federalizing the definition of marriage, and therefore family, would destroy the coherence and integrity of over a century of carefully crafted jurisprudence designed to preserve the constitutional allocation of authority in our federal system. It would make a mockery of this Court's professed respect for democratic self-government, including this Court's decision in *Schuette*. It would wreak havoc on centuries of carefully crafted precedent under the Tenth, Eleventh, and Fourteenth Amendments as well as this Court's decision in *Windsor*. Such a result would be truly lamentable. Fortunately it is easily avoided.

This Court's recent decisions in *Windsor* and *Schuette*, taken together, provide the correct basis for the proper resolution of this case. *Windsor* shows that the Petitioners' effort to harness the Fourteenth Amendment is fatally flawed because it "departs from this history and tradition of reliance on state law to define marriage," *Windsor*, 133 S.Ct. at 2692, and *Schuette* shows that there is therefore "no authority in the Constitution of the United States or this Court's precedents for the Judiciary to set aside," these Marriage Amendments. *Schuette*, 134 S.Ct. at 1638. Accordingly, this Court should refuse to do so.

CONCLUSION

The Petitioners' audacious effort to enlist this Supreme Court in their campaign to constitutionalize

and revolutionize the definition of marriage and family throughout the United States must be rejected. The Fourteenth Amendment provides no legitimate grounds for such action because the history and traditions of our nation unequivocally show that marriage has always been understood as the union of one man and one woman. Consequently, Petitioners cannot show that the Marriage Amendments deprive them of a fundamental liberty interest in violation of substantive due process, and by the same token, cannot show that they have been deprived of the equal protection of the law. Using the Fourteenth Amendment to invalidate the Marriage Amendments challenged here would make a mockery of this Court's stated regard for democratic self-government as allocated in the federal system. Federalizing the definition of marriage and family would lay waste to over a century of carefully crafted jurisprudence designed to preserve the constitutional allocation of power in our federal system.

For these reasons, explained more fully above, the decision below must be affirmed.

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